86-102 (3)

No. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1986

MARK LEWIS SINGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II OF II

MESHBESHER, SINGER & SPENCE, LTD.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,	. Docket No. 4-80 Crim.
Plaintiff,	. 52
v.	.
MARK LEWIS SINGER, OAKLEY BECHTEL CLINE, III, JOSEPH MICHAEL SAZENSKI, ARTURO AUGUSTIN IZQUIERDO, JOHN PATRICK REYNOLDS,	. Little Rock, .Arkansas November 9, .1983 5:00 O'Clock .P.M.
Defendants.	.

. . . . . .

TELEPHONE CONVERENCE OF
NOVEMBER 9, 1983,

BEFORE THE HONORABLE G. THOMAS EISELE, United States District Judge for the Eastern District of Arkansas.

APPEARANCES: (By Telephone)

For the Plaintiff:	JOHN M. LEE, Esq. FRANKLIN L. NOEL, Esq. DANIEL SCHERMER, Esq. Assistant United States Attorneys 234 U.S. Courthouse Minneapolis, Minnesota 55401
For Defendant Singer:	RONALD MESHBESHER Esq. 1616 Park Avenue Minneapolis,

Minnesota 55404

For Defendant Sazenski: MARK PETERSON, Esq.
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For Defendant Izquierdo: PHILIP RESNICK, Esq.
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Minneapolis, Minnesota 55402

P R O C E E D I N G S

THE COURT: Good afternoon, gentlemen.

MR. LEE: Good afternoon, Judge. I'm going to put you on the speaker phone. It will take me just a few seconds here.

I have Ronald Meshbesher present, Philip Resnick, Mark Peterson, all representing defendants, as well as Mr. Noel and Mr. Schermer of this office.

THE COURT: Very well. I thank you all for coming in. I apologize for being a little late, but I've been working on this matter all day. In fact, --

MR. MESHBESHER: Judge, we're going to have to stop meeting like this.

THE COURT: Well, I started at 4:00 this morning, so I'm about to run out of steam. But I have a heavy docket down here, and I wanted to get into this matter thoroughly and attempt to get it behind me.

Gentlemen, I have made a decision on the basis of the record that has been made. But before I go to the decision, I want to take up a couple of matters.

First, let me tell you that I received both Mr. Meshbesher's letter of the 8th of November and the Government's letter signed by Mr. Noel of November 8th. They came in this afternoon.

Now let me ask this. At one point in one of the hearings -- I think before Judge Murphy -- Mr. Meshbesher offered to introduce as a document what I am assuming to have been the briefing and the affidavits that were being suggested or that were

being prepared as a result of Judge Lord's suggestion at the ex parte conference after the trial but before sentencing and which dealt with preindictment delay.

Mr. Meshbesher, did you have or do you have such a document to offer as an exhibit?

MR. MESHBESHER: I do, Your Honor.

THE COURT: I am going to receive it. I'm not certain what it is. What is the affidavit about and by whom?

MR. MESHBESHER: As you described, it's an affidavit by Ronald Johnson. I think it's the one he referred to in his testimony that you took via telephone.

THE COURT: I'm going to receive it.

Now then, I note elsewhere -- I'm going to ask counsel to help me with this. Do I understand the Eighth Circuit did not really consider the affidavit but based its decision upon the other parts of the record? Is that correct?

MR. LEE: It's my reading of their opinion and it's my understanding based upon talking to the lawyers in this office involved in the case that the Eighth Circuit did not consider those materials.

THE COURT: Well, of course, the Eighth Circuit will know and I just haven't had time to study that particular appellant record, but I thought I would mention it.

MR. MESHBESHER, I'm not sure, Judge Eisele, if that refers to that particular document or another one. It was never clear to me.

THE COURT: Very well.

Now, gentlemen, I think these issues that have been referred to me raise extremely interesting and very sensitive issues. I have given them a lot of thought and stayed awake a lot thinking about it. I have now come to a conclusion. I'm going to -- I have a bunch of handwritten and typed notes here which, I

hope, I can follow through coherently to state the background of the matter and the facts and my reasoning and my conclusions.

First, a brief history of the matter. Defendant Mark Singer and others were convicted on a number of drug-related offenses on December 18, 1980, in the Federal District Court for the District of Minnesota with Chief Judge Miles Lord presiding. Mr. Ronald Meshbesher and Ms. Carroll Grant represented Mr. Singer, who himself was a lawyer.

On June 20, 1983, with three judges dissenting, the Eighth Circuit Court of Appeals, in the exercise of its supervisory power over the administration of criminal justice in this circuit, reversed the convictions of all defendants on the ground that the trial judge so far injected himself into the trial proceedings as to give the jury the impression that he favored the prosecution, thus depriving the defendants from having their guilt or

innocence determined in a proceeding free of a fatal appearance of unfairness. The Court of Appeals did not dismiss the indictment but rather remanded the case for a new trial and further proceedings consistent with its opinion. And I cite the United States versus Singer case, 710 F.2d 431, and particularly pages 432 and 437 with respect to the dispositive actions of the Court of Appeals.

On July 20, 1983, two days after the mandate was filed, Judge Lord disqualified himself and the case was assigned to Judge Diana Murphy. The new trial was scheduled to begin on September 14, 1983.

On September 9, 1983, Mr. Meshbesher received from Assistant United States Attorney John Lee a package of documents in which were copies of documents contained in the confidential lawyer-client file of Mark Singer, located in Mr. Meshbesher's office. Those documents, although now, of course, known by Mr. Singer and

Mr. Meshbesher and, of course, also known by the representatives of the Government, have been received into evidence in this proceeding under a ruling by Judge Murphy protecting them from public disclosure at this time.

They included copies of attorney-client correspondence, trial preparation memoranda, comments on expected testimony, and trial strategy. All appear to be documents prepared before the original trial in 1980.

On September 13, 1983, Mr. Meshbesher moved to dismiss the case against Mark Singer, first, on the ground of prosecutorial misconductd with respect to the documents which had somehow been taken from his office files and second, on the ground of judicial misconduct. At the time the motion was filed Mr. Meshbesher was apparently relying on Judge Lord's conduct during the first trial of Mr. Singer as to the judicial misconduct complained of.

Later during the course of the various proceedings complaints concerning Judge Lord's actions after the first trial, and even after the appeal, were added. All of the other defendants have joined in Mr. Singer's original and expanded motion to dismiss and in the ancillary motions filed by him.

Between and including September 14 and September 20, 1983, several hearings on the motions to dismiss and on the related motions were conducted by Judge Murphy. On motion of the defendants, Judge Murphy on September 27, 1983, recused in the case because she wished to avoid any appearance of impropriety. On October 4, 1983, Chief Judge Lay of the Eighth Circuit assigned the disposition of the motions to dismiss and ancillary proceedings related thereto to this United States District Judge.

All pertinent pleadings, transcripts of open court and in camera hearings and supplemental material have been delivered

to our offices for our use in discharging our duties under Judge Lay's assignment. And all of such material has been read and considered.

Now, gentlemen, on the basis of the in camera and open court showings made by the Government, I have now concluded that the Government to this point has done nothing which would warrant the dismissal of the charges against Mr. Singer or any of his co-defendants. Therefore, I am going to overrule the defendants' motion to dismiss. I will discuss this ruling further in a few minutes.

I have further concluded that it would not be necessary or appropriate for me to pass upon all of the other pending motions, although I will dispose of some of them.

I am this date dictating into the record, outside of the presence of any of you attorneys in the case, that includes both the Government and the defendants'

attorneys, a brief, additional explanation for the purposes of the record and for the judge or judges who handle this matter hereafter of some of the reasoning that has lead (sic) me to the conclusions that I have reached and which I do not feel would be appropriate to disclose on the open record.

Furthermore, I am advising all counsel that although I am denying the defendants' request to divulge the identity of the so-called informer or informers at this time, that issue might be raised again if any change in circumstances might so warrant.

I have already advised the parties that I was overruling defendants' motion to dismiss on the basis of the alleged judicial misconduct. The defendants were given a full opportunity to bring to this Court's attention any and all actions or statements by Chief Judge Lord which they believe might warrant dismissal of the

charges contained in the indictment. Viewing the evidence in the light most favorable to the defendants, this Court has concluded that the same would not warrant, under appropriate legal standards, the dismissal of such charges. A few comments, I believe, are necessary.

There is much ambiguity in the evidence relating to certain of the contacts between the Government's representatives and Judge Lord. Some appear to be completely innocent, accidental, or happenstantial and appear to rise out of the close proximity of the -- probably of the offices of the judge and the daily contacts which judges have with members of the United States Attorney's office.

However, although Judge Lord has not been given any opportunity to respond or to explain, this Court is willing to accept for the purposes of its ruling upon the motion to dismiss that one of the ex parte meetings between the judge and the

prosecutor after the trial, but before the disposition of all post-trial motions and before sentencing, -- that is, the meeting which dealt with the Court's concern about the adequacy of the record and the briefing with respect to the preindictment delays -- was wrong. It cannot be justified under appropriate judicial or professional standards. And as Mr. Meshbesher notes, both the prosecutor and the judge were wrong to participate in this type of an ex parte meeting. The results of that meeting it is assumed went into the record and were part of the record during the appeal.

Now United States District Judges, the trial judges in our federal system, are members of the Judicial Branch of our Government. The United States Attorneys and their assistants are members of the Executive Branch. The Government of the United States comes into our court, our federal courts, on the same footing as other parties to cases filed in our courts.

Government attorneys, like all attorneys, must carefully guard against ex parte contacts with district judges concerning cases and matters pending before such judges.

More importantly, judges should, while maintaining open and cordial relationships with members of the Bar, neither encourage nor permit ex parte comments concerning pending matters from the attorneys involved with those matters.

It appears that Judge Lord here after having heard the evidence at the trial, had strong feelings about the case and a natural curiosity about its progress and management. If the judge had had all parties before him at the time he commented about that the briefing and the record were inadequate in some respects, such comments would not have been ex parte, although some might well contend that it would nevertheless have been further evidence of his inclination to assist the

Government in this case in situations where he obviously felt the Government attorneys were not adequately presenting certain issues.

But here the meetings were ex parte, and the counsel for the defendants were unaware of it and had no opportunity to state their own views on the record, nor did they have the knowledge which would have permitted them to make a point of such ex parte meeting on appeal in connection with their overall attack on Judge Lord's impartiality.

But they won that issue even without this additional circumstance. Had they lost and had the case been affirmed, different arguments for other relief might have been appropriate. But even accepting the Court's -- even accepting that the Court's inviting counsel in and conferring ex parte, as indicated, was wrong, the remedy here should not be the dismissal of

the serious pending charges against the defendants.

The United States of America and the people of this country have the right to have those who have been properly indicted tried upon the criminal charges against them. In all but the rarest of circumstances, then, the independent errors and even the wrongs of the district judge in the management and trial of a criminal case may at most occasion the remedy of a new trial before another judge.

Defendants have already obtained that relief here. This Court finds nothing in the record made concerning the complained-of statements or actions of Judge Lord that will or would prejudice them in the retrial presided over, as it will be, by a different district judge, who will have available to him or to her the tools necessary to deal even with the difficulties created by any possible preju-

dicial pretrial publicity arising out of these proceedings.

Now I must state that no trial judge welcomes the responsibility of passing judgment upon the actions of a fellow trial judge. Furthermore, I identify some with Judge Lord in the trial situation in which he found himself. I, myself, have been known to actively participate in the questioning of witnesses in both criminal and civil cases where such appears necessary in order to clarify the evidence or to assist the jury in discharging its duty to reach a just verdict. Such actions are based upon the firm belief that the courtroom is not simply an arena provided by the taxpayers for the purpose of determining which attorney is the best or most skillful lawyer.

Hopefully the decision of the Eighth Circuit in the Singer case will not inhibit or chill the inclination, and, I submit, the duty of conscientious trial

judges to act upon the predicate that the courtroom is the place where the truth will come out and justice will be done. And I might say, I do not so read the majority opinion in the Singer case as suggesting otherwise.

So while I may hesitate to condemn some of the complained-of participation by Judge Lord in the ten-day trial, this Court does not hesitate to condemn in principle any improper ex parte communication betwen a judge and an attorney, however innocently intended.

But, we destrict (sic) judges all have our bad days and frequently -- even when we act out of our concern to see that justice is done -- we make mistakes and sometimes bad mistakes. But, then, that is what the appellate courts are there for. They can review our actions and our decisions and, where appropriate, reverse us. We don't usually like it, but we recognize

the necessity for, and the importance of, appellate review.

Now all of you attorneys know that there are remedies for serious and egregious judicial misconduct, both under the constitution and, at least some contend, under Acts of Congress and under the supervisory authority of appellate courts. And, of course, there are potential civil remedies when ajudge acts completely outside of his judicial duties and responsibilities.

But it is my opinion that it will be a rare case, indeed, where the Government and the people of this country will be denied the right to prosecute properly alleged law violations because of errors, mistakes, or even wrongs of a trial judge in discharging his official judicial responsibilities.

Now the defendants have urged a double jeopardy argument in connection with the issue of judicial misconduct, as

well as prosecutorial misconduct, but I do not believe it has merit under the facts and circumstances here. Without going into any great detail, I draw your attention to United States versus Jorn, J-o-r-n, 400 U.S. 470 and the comment made at page 479. This was a 1971 Supreme Court case. More particularly I mention United States versus DiFrancesco, 449 U.S. 117 at 131, a 1980 case, in which the United States Supreme Court summarized the applicability of the double jeopardy clause to retrials of defendants who obtained reversals of their convictions on appeal.

I quote: "Finally, if the first trial has ended in a conviction, the double jeopardy guarantee imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside." citing North Carolina versus Pearce.

Going on: "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." Citing United States versus Tateo, T-a-t-e-o.

"To require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction, is not an act of Governmental oppression of the sort against which the double jeopardy clause was intended to protect." Citing United States versus Scott.

"There is, however, one exception to this rule: The double jeopardy clause prohibits a retrial after a conviction has been reversed because of insufficiency of the evidence."

Now the general rules appear to control in this case. In addition to all the cases I have found in which convictions

were overturned on the basis of judicial misconduct or bias, the remedy affored (sic) the defendant has been a new trial. I find no cases where the indictments were dismissed. I will mention a few of the cases as examples: Berry versus United States, 283 F.2d 465, (8th Cir. 1960), cert. denied, 364 :U.S. 934; U.S. versus Michienzi, M-i-c-h-i-e-n-z-i, 630 F.2d 455, (6th Cir. 1980); U.S. versus Bray, B-r-a-y, 546 F.2d 851 (10th Cir. 1976); Richards versus U.S. 318 F.2d 639 (9th Cir. '63); U.S. versus Guglielmini, G-u-g-l-i-e-l-m-i-n-i, 384 F.2d 602 (2nd Cir. '67); and :U.S. versus Cassiagnol, C-a-s-s-i-a-g-n-o-l, 420 F.2d 868 (4th Cir. 1970).

In short, where a defendant obtains a reversal of his conviction on any grounds other than the sufficiency -- insufficiency of the evidence, the Government can retry him. Defendants here obtained a reversal on the ground that Judge

Lord's repeated remarks and actions during the trial prevented the defendants from receiving a fair trial. This ground did not go to the sufficiency of the evidence, and, therefore, permits retrial of the matter.

Mr. Meshbesher points out that the ex parte meeting between the judge and the Government counsel involved prosecutorial, as well as judicial misconduct, and, of course, that is true even though counsel are placed in a most difficult and awkward situation if a judge invites or solicits such an ex part meeting.

Nevertheless, despite the admitted wrong, dismissal is clearly not the appropriate remedy under the facts and circumstances as discussed above. The defendants will have a new trial before a different judge and dismissal is not warranted.

Now we return to the allegations of prosecutorial misconduct. The facts con-

cerning Mr. Meshbessher's files, as represented by the Government and as testified to by Sergeant Johnson and Mr. Schermer, are generally as follows: A person who, whether correctly or not, has been referred to as an informer contacted Mr. Schermer and indicated that a crime or crimes had been committed and that said informer had documents which would prove that to be the case. Shortly thereafter, Sergeant Johnson interviewed the informer and was also told that the informer had documents that would prove the commission of a crime or crimes other than those charged in this case.

Before receiving these documents, Sergeant Johnson, and later Mr. Schermer, wre aware that those documents had been taken from the confidential attorney-client files regarding this case found in Mr. Meshbesher's office. But before receiving such documents, Sergeant Johnson, and later Mr. Schermer, also determined that

said files came from a non-government source without any participation on the part of the Government or law enforcement officers.

The original contact by the informer was in the fall of 1982, more particularly in September of 1982. Sergeant Johnson was advised that the informer had had the documents in question for a substantial period of time. It also does not appear that Sergeant Johnson had ever known the so-called informer before the contact I mentioned above. There is evidence that the informer received and had possession of the documents prior to the original trial in 1980.

Several months after the Eighth Circuit reversed defendants' convictions and granted them a new trial, the new attorney for the Government on this case notified Mr. Meshbesher that the Government had possession of such documents and provided him with copies thereof. The Government

stated that it did not intend to use the documents in its case in chief at the retrial. Mr. Meshbesher then filed his motions to dismiss and embarked upon an effort to find the facts and circumstances surrounding the removal of the files from his office.

In that process he sought to determine the identity of the so-called informer. So far he has been denied the right or the opportunity to learn the identity of that person. He has also been somewhat restricted in his right to investigate and to explore the circumstances surrounding the removal of his files or the accuracy of the Government's representations with respect thereto. However, he has been given a fairly broad opportunity to explore with the key Government witnesses, Sergeant Johnson and Mr. Schermer, the circumstances under which they came into possession of the files.

Mr. Meshbesher naturally contends that he is not obligated to accept the testimony or representations of the Government witnesses and that the entire matter should be opened up to a full plenary evidentiary hearing to determine all the facts and circumstances relative to the manner in which the documents were obtained from his office and the manner in which they came into the hands of the Government. Both Judge Murphy and I have ruled that under the facts and circumstances disclosed both in open court and in camera, neither Mr. Meshbesher nor Mr. Singer or the other defendants are entitled to go further in such inquiry.

Although Mr. Meshbesher is suspicious that the Government may have had the files before the first trial and makes certain arguments concerning the Government's handling of the first trial, which he feels suggests that the Government was in possession of such files, the Court

after reviewing the same finds nothing in the record so far developed which would support such conjecture or suspicion on Mr. Meshbesher's part.

Since defendants' counsel admits that they have no other independent evidence contrary to or which would tend to impeach the factual representations made by Sergeant Johnson or Mr. Schermer as to the manner in which they came into possession of the documents, the question becomes whether, in the absence of any such other evidence, the defendants should nevertheless be able to go on a discovery expedition among the Government's attorneys, the Government's agents, their witnesses, and their files.

For the reasons which the Court will state here, and for additional reasons which it will state in its in camera comment outside of the presence of all of the attorneys, the Court has concluded that neither the defendants nor their attorneys

should be permitted to make any further inquiry at this time. In fact, Judge Murphy and I may have permitted defendants' counsel to go further than the law would ordinarily require under the facts and circumstances as have been shown to obtain here. But this is an unusual case. We are dealing with something that is very sacred to a trial attorney, the confidential nature of his files and of the information he obtains in his office.

The Court recognizes the frustrations which defendants' counsel and their clients must feel under the circumstances. But the facts and representations made by the Government in open court and in camera require this Court to cut off further inquiry at this point.

So the question, therefore, becomes whether the receipt, possession, and possible use by the United States of copies of documents taken from the defendants' attorney's file, without authority by a non-gov-

ernment agent and not acting on behalf of the government, violates the defendants' Fifth Amendment right of due process or Sixth Amendment right to effective defense assistance of counsel.

The representations and the testimony, both in open court and in camera, support and are consistent with the Government's view that the files -- that the file documents were taken from Mr. Meshbesher's office by an individual or individuals who were not Government agents and were not in any working for, or at the request, or at the direction of the Government. And further that those documents came to the attention of the Government approximately two years after they were taken and approximately two years after the original trial.

The documents were offered to the Government not to help in the prosecution of the defendants, but to help establish that other, collateral crimes had been

committed. There is absolutely no evidence that the Government was involved in obtaining or soliciting others to obtain the Meshbesher files. Since the files were given to the Government upon the representation that they would disclose evidence of a crime or crimes, the Untied States Attorney's office not only had the right, but it also had the duty, to examine such materials in order to explore such allegations of criminal wrongdoing.

What was said in Burdeau versus McDowell, 256 U.S. 465 at page 475, therefore, applies: "The papers having come into the possession of the Government without a violation of petitioner's rights by Governmental authority, wew see no reason why the fact that individuals unconnected with the Government mayhave wrongfully dtaken them should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."

As far as this record reveals, the Government has acted properly with respect to these documents, which were turned over to it by the informer. Therefore, the motion to dismiss the indictment will be denied.

It think it's important to emphasize that the legitimacy of the Government's actions with respect to the files obtained from Mr. Meshbesher's office in this particular case turns on the representation by the informer that those files would reveal evidence of other crimes. Let's stop for a moment and assume a different scenario.

Assuming the United States Attorney's Office reveived in the mail one morning a file containing evidence -- containing confidential memoranda and trial preparation materials of a defense attorney in a case which is scheduled for trial. Clearly it would be improper for the United States Attorney or attorney for the

Government to read or review those notes or files as soon as he or she became aware of what they in fact were. The duty upon receiving such, in the absence of any allegations that they would be pertinent to any ongoing or contemplated criminal investigation, would be to return them promptly to the defense attorney without looking at them even.

So I emphasize it is a very important circumstance here that these documents were turned over to the Government upon the representations that they would disclose evidence of a crime or crimes.

Now although I'm going to overrule the motion to dismiss the indictment, there is some collateral relief that, I think, the defendants are entitled to. I'm not sure whether this should be incorporated in a specific order, but we have a situation in which clearly a crime was committed when Mr. Meshbesher's files were stolen. The Government learned a few days

before September 16, 1983, that the informant had additional Singer file documents from Meshbesher's office that were not turned over to the Government.

Now, then, Judge Murphy entered some order, in effect, preventing the Government from obtaining any more documents and providing that if it did get them, it should turn them over immediately to her. And very late in the proceedings before she recused, she was about to take up that matter again.

My view is that I can dispose of this issue. These files belong to Mr. Meshbesher. The appropriate law enforcement officers should make every effort to obtain same and to see to it that they are returned to Mr. Meshbesher. Furthermore, those additional files should not be read or examined by any United States Attorney or representative of the Government or law enforcement office, since there is no alle-

gation that those files disclosed any criminal wrongdoing.

The procedure to be followed here, I think, to protect all concerned will be for the appropriate law enforcement officer to obtain the documents, seal them and turn them over to the Clerk of the United States District Court for the District of Minnesota. The Clerk will break the seal and make a brief inventory of the documents, seal the inventory, and then return the documents directly to Mr. Meshbesher without revealing them to any judge of this court or to any other person.

UNITED STATES OF AMERICA
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA Plaintiff,	Docket No. 4-80 Crim. 52
v.	Little Rock, Arkansas
MARK LEWIS SINGER, OAKLEY BECHTEL CLINE, III. JOSEPH MICHAEL SAZENSKI ARTURO AUGUSTIN IZQUIERDO, JOHN PATRICK REYNOLDS, Defendants.	December 21, 1983 5:00 O'Clock p.m.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Before the Honorable G. THOMAS EISELE, United States District Judge for the Eastern District of Arkansas.

APPEARANCES: (By Telephone)

For the Plaintiff:	JOHN M. LEE, Esq. Assistant United States Attorney 234 U.S. Courthouse, Mpls., MN 55401
For Defendant Singer:	RONALD MESHBESHER, Esq. Meshbesher, Singer & Spence, Ltd., 1616 Park Avenue Mpls., MN 55404

THE COURT: All right, gentlemen, are you there?

MR. LEE: Judge Eisele, this is John Lee.

THE COURT: Yes, Mr. Lee.

Mr. Meshbesher?

MR. MESHBESHER: Mr. Meshbesher is here, Your Honor.

THE COURT: Gentlemen, I am prepared to conclude this matter. I am not going to write an opinion, but I am going to dictate my findings and conclusions at this time, and that will be it. They are as follows:

After a full evidentiary hearing, the Court concludes taht the facts, which will be discussed later, do not warrant the dismissal of the charges pending against Mr. Singer or any of his co-defendants. Therefore, the defendants' motions to dismiss will be overruled. However, the Court is of the opinion that the defendants are entitled to certain relief

in order to protect the defendant Singer's interest in effective representation by an attorney of his choice and all of the defendants' interests in a fair retrial. The granting of such relief will not, of course, prevent the trial judge from granting additional relief should it be requested and merited, or otherwise indicated.

The Court adopts all factual findings heretofore made during the oral arguments on Thursday, December 15, 1983. If, however, there is any conflict or incosistency with the facts now being stated and those stated on December 15, 1984, the facts as stated herein shall control.

The Court finds that copies of the Singer case attorney-client files involved in this controversy were taken from Mr. Meshbesher's office by an individual or individuals who were not government agents and who were not working for, or at the

request of, or at the direction of the government or any law enforcement agency. It is not clear when or how many copies were made and removed from Mr. Meshbesher's control. Apparently the originals of the documents copied have always remained in Mr. Meshbesher's office.

From all the evidence it appears likely that the copies were made immediately before or at the time of the first trial in December 1980. The Court further finds that the copies of the files in question came into the hands of Mr. Marshal Stoll not later than the spring of 1981. Stoll, who was one of the defendants in this indictment, was a fugitive at this time. He surfaced in California around May of 1982, at which time he contacted a public defender by the name of Mr. Daniel Cook. Mr. Cook apparently first attempted to work out a Rule 20 disposition but such negotiations

were not successful and Mr. Stoll had to return to Minnesota where he was arraigned and pled "not guilty" before Magistrate Cudd on July 22, 1982. Mr. Mark Wernick was appointed to represent Mr. Stoll. On August 19, 1982 Wernick was appointed to represent Mr. Stoll, pursuant to some plea agreement, entered a guilty plea before Judge Lord. Seargent Johnson, as the case agent, was present in court when the plea was taken. The Court has received in evidence a copy of the transcript of the plea. I don't believe it ws made an exhibit, but I wanted to make it clear that it is part of the evidence.

The Court finds pursuant to an agreement to cooperate, Mr. Stoll met Sergeant Johnson at Wernick's office sometime around October 1, 1982 for the purpose of being debriefed. The Court finds that sometime before Mr. Stoll turned over the Meshbesher files he read a transcript of the trial testimony of Mr.

Gilbert Singer. The Court further finds that both Sergeant Johnson and Mr. Schermer, the Assistant United States Attorney who tried the case in 1980, were convinced that a Mr. Booker was the kingpin of the drug operation and they were also convinced that Mr. Gilbert Singer had not told the truth with respect to the ownership and control of certain off-shore corporations and the ownership by one of them of a residence in Miami located on 112th Street where Mr. Stoll and others were arrested in April 1978 in possession of some 1500 pounds of marijuana.

The Court further finds that Mr. Stoll, after reading the transcript of Mr. Gilbert Singer's testimony advised Sergeant Johnson that Mr. Singer was lying and that he, Stoll, could prove it is part by copies of certain attorney-client files that he had obtained from Mr. Meshbesher's office. Sergeant Johnson thereupon

inquired of Mr. Schermer if it would be proper for him, Johnson, to obtain copies of said files. Mr. Schermer examined the law and became convinced that the government was entitled to receive, use, and keep such files if it, the government, had played no role in wrongfully procuring those files from Mr. Meshbesher's office. Although the Court, as indicated below, disagrees with this view of the law in good faith. And he so advised Sergeant Johnson. Seargeant Johnson then requested that Mr. Stoll turn over to him all of the copies of the Meshbesher-Singer files that he possessed. It should be stated that Mr. Stoll, shortly after meeting with Sergeant Johnson in Mr. Wernick's office, also met with Sergeant Johnson and Mr. Schermer in the latter's office and repeated his assertion that the Meshbesher files would reveal, he believed, evidence of perjury on the part of Mr. Gilbert Singer.

These facts give focus to one of the central legal issues in this case. It is the Court's view of the law, as previously alluded to during the various hearings herein, that whatever may be the cazse with respect to other types of materials that may innocently come into the government's hands, the government has no right or license to examine confidential attorney-client trial preparation files simply because the government is not associated in any way with the wrongful taking of those files.

The Court has used the illustration of a United States Attorney receiving an envelope in the mail which, when opened, reveals what appears to be the attorney-client file of some defendant who is being prosecuted by that same United States Attorney. The question was put: Would that United States Attorney have the right to read over, study, keep, or use such a file? The Court has concluded that

the answer is "No" and that the United States Attorney in this hypothetical case would be required to immediately return the file to the lawyer without even examining it and certainly without copying it. All parties recognize that the law goes to extremes to protect the attorney-client relationship, to the end that persons charged with crime will be entitled to enjoyh their Sixth Amendment rights to effective representation by attorneys of their choice. Courts should eschew any principle of law that would countenance any intrusion into the attorney-client relationship or which would undermine it or render it ineffective.

However, if a government agent or attorney has reasonable cause to believe that such an attorney-client file contains evidence of other crimes -- that is, other than the crime charged which is the occasion for the existence of the file in

the first place -- or that the file would lead to such evidence, or would reveal the commission of such other crimes, then such governmetn agent or attorney would not only have the right, but would have the duty, to accept possession of such tendered files and, indeed, to examine same. And this is true even if, upon examination, it turns out that said files do not contain evidence of such other crimes as so represented. So it is the representations made, and reasonably believed, that both permit and limit the government's rights to examine, use, or keep such attorney-client files. The case before us is a good illustration.

Mr. Stoll was representing that he believed that the Meshbesher files would show that Mr. Gilbert Singer was lying about the off-shore corporations and the ownership of the land in Miami. It is clear now, after the fact, that very few, if any, of those file documents constitute

actual evidence of perjury. Neither Mr. Schermer nor Sergeant Johnson requested Mr. Stoll to go through the files and turn over to them only those documents which he believed provided some evidence of this other crime. Instead it is clear that Sergeant Johnson actively sought to obtain all of the documents he could prevail upon Stoll to turn over to him. So we have a situation in which the government might, under the Court's view of the law, properly come into control of a very few of the documents at issue, but it would not have had a right to the bulk of the documents.

The government of course will take the position that the Court is making too fine a distinction. It argues that it had to examine all of the documents to determine which, if any might disclose evidence of perjury as represented by Mr. Stoll. But this is an area where nice distinctions are essential if the law is

to strike a reasonable balance between the interests involved.

The law ought to be such that a red flag would go up the moment a government agent, and particularly a government attorney, realizes he has such a confidential attorney-client file in his hand, or that someone is offering him the opportunity to look at, or examine such a file. The first question he should ask is whether there is any possible legal basis which would permit him to even look at such a file. If no representations at all have been made to the government agent or attorney with respect to the contents of the file, then, of cours,e under this Court's view of the law, the duty of the government attorney or agent would be to return the file forthwith, unread, to the rightful owner.

If, on the other hadn, a representation is made that the file contains evidence of a collateral crime,

lthen the government agent must make a serious and consceintious effort not to obtain more of the file than is embraced in the representations concerning collateral wrongdoing. Otherwise, such a representation could become simply an excuse to broadly intrude into and perhaps destroy the underlying attorney-client relationship.

The real evidence here of perjury by Gilbert Singer, if indeed there be any, is the anticipated contrary testimony of Mr. Stoll, assuming he is to be believed. Additionally, Mr. Stoll advised Sergeant Johnson and Mr. Schermer that the real truth concerning the off-shore corporations and the land transactions could be demonstrated by simply following the "money trail" involved in the pertinent transactions. The Meshbesher files are really beside the point. Furthermore, Mr. Stoll's testimony in this proceeding also indicates that he actually

show the commission of a collateral crime. He appeared content to let the government agents examine the files to see if -- and I emphasis the word "if" -- it provided any assistance in that respect. So, although he originally represented that the file did contain such evidence, at the hearing Mr. Stoll backed off, recognizing, at best, that it contained a few documents which might be considered consistent with such a theory.

The Court concludes that the original representations by Mr. Stoll to Sergeant Johnson and to Mr. Schermer would have permitted a limited examination of a few of the documents at issue. It has in fact resulted in a review of the defendant's trial strategy documents which, under proper procedures, the government should never had received or examined.

The government has, therefore, knowingly intruded into the defendant's trial strategy files, albeit in the honest

and good faith belief that it had a perfect legal right to do so. But has the defendant Singer been significantly prejudiced as a result thereof?

Although stated in various terms by the Courts, for a criminal defendant to prove a violation of his Sixth Amendment right to effective representation of counsel of his choice, he must show: one, a knowing intrusion by the government into the attorney-client relationship; and two, prejudice to his defense. See United States versus Davis, 646 F.2d 1298, 1303, Eighth Circuit, 1981, cert. denied 454 U.S. 868 where it is stated:

"In addition to the intrusion on the attorney-client relationship there must exist a nexus between the intrusion and some benefit to the prosecution."

In United States versus Irwin, 612 F.2d 1182, 1186-87, Ninth Circuit, 1980, it is stated:

"From Weatherford and Glover and the cases they interpret, it is apparent that mere government intrusion into the attorney-client relationship, althout not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself in many ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

There are cases which suggest if the government knowingly intrudes into the trial strategy defense files, no proof of

actual prejudice is necessary and that the only appropriate remedy is the dismissal of the indictment. See United States versus Levy, 577 F.2d 200, 207-208, Third Circuit, 1978, where it said, and I quote:

"In our judgment, the only appropriate remedy is the dismissal of the indictment. As a result of the district court's decision that no Sixth Amendment violation occurred, the same strike force group which originally handled the case was allowed to proceed with the trial. The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with

key government witnesses. More important, public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain. At least in this case, where the trial has already taken place, we conclude that dismissal of the indictment is the only appropriate remedy. We need not decide whether dismissal would be required when the defense strategy has been disclosed to government agents but has not become public information."

Not only are the facts different here than they were in the Levy case, but this Court believes that such cases as the Levy case must now yield to the principles stated subsequently by the Supreme Court in the United States versus Morrison I do not have the U.S. citation. 101 S. Ct. 665, 1981. In that case the Supreme Court stated, and I quote:

The Sixth Amendment provides that an accused shall enjoy the right to have the assistance of counsel for his defense. This right, fundamental to our system of justice is meant to assure fairness in the adversary criminal process. Our cases have accordingly been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective. Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not be unnecessarily on competing interests. Our relevant cases reflect this approach."

The Court then discusses those cases and then it goes on to say:

"Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to ssure the defendant the

effective assistance of counsel and a fair trial."

Further on it states: "More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."

And, finally the Court concludes: "In arriving at this conclusion,we do not condone the egregious behavior of the government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings."

Simith versus Phillips, 102 S. Ct. 940, 947, a 1982 case, also provides some guidance for us even though it did not deal with the Sixth Amendment situation. There the Court said:

"The touchstone of due process analysis in cases of alleged prosecutorial

misconduct is the fairness of the trial, not the culpability of the prosecutor."

The further on: "The aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused."

The wisdom of the Supreme Court in refusing to adopt a per-se approach can be seen when one further examines the facts in this case. This is not a case where the trial strategy documents were examined before the original trial. Those files were not seen by the government until almost two years after the first trial. The government has suggested that the strategfy information prepared by the defendant Singer and his attorneys in anticipation of the first trial is now strictly "old news."

And, indeed, it must be conceded that the best evidence of the defendant Singer's trial strategy for the first

trial will be found in the transcript of the trial. Naturally the conduct of a trial will reveal the strategy used.

The Court notes also that the files were sealed by Judge Murphy and that none of the strategy portions of such files, contrary to the situation in the Levy case, have become or has become a part of the public domain. A very few items have been used by the defendant in examining and cross examining witnesses. And, of course, Sergeant Johnson and several Assistant United States Attorneys are familiar with the entire file. But the trial preparation and strategy files have not become a part of the public domain.

The government, furthermore, has represented to the defendants and to the Court that it does not intend to use the files in its "case in chief" during the retrial. The Court, however, is not satisfied that either the government's "old news theory or its undertaking to

limits its use of the Meshbesher files is adequate to demonstrate no prejudice or to adequately guard against possible future prejudice.

If the government's trial attorney is thouroughly familiar with the defendant's strategy files, it is almost impossible to state with any assurance that the defendant will not be prejudiced directly or indirectly by their use during the retrial. And, a fortiori, if the government is actually permitted to overtly use those files while cross examining witnesses for the defense and during rebuttal, the prejudice is obvious. What is needed, therefore, is an order, or orders, of the Court which will, for practical purposes at lease, remove any significant threat of actual prejudice derived from the knowledge or possession of such confidential strategy files.

The Court will therefore order the government to forthwith return to the

defendant Singer's attorney, Mr. Meshbesher, all copies of such documents in its possession or in the possession of any law enforcement officer working on the case, excepting only those file documents which it specifically represents to the Court contain evidence of perjury by Mr. Gilbert Singer or subornation of perjury. Of course, one copy thereof will remain as an in-camera exhibit in this proceeding at least until its termination.

The Court will further order that no United States Attorney, Assistant United States Attorney, or other government attorney who has examined, discussed, or otherwise become aware of any of the contents of the Singer-Meshbesher file will be permitted to participate in the retrial of this case. The United States Attorney for the District of Minnesota will have to determine whether any Assistant United States Attorney in his office can meet this test. If not, some

"outside" United States Attorney or Justice Department attorney will have to be chosen.

In addition, the Court will order Sergeant Johnson and all other law enforcement officers having any knowledge of the Singer-Meshbesher files never to mention, use, or refer to same while working on this case with the attorney assigned thereafter to handle the retrial.

The Court now turns to the remaining issue. The defendant Singer contends that the indictment should be dismissed because of the misconduct of the prosecution in "going public" concerning the Meshbesher files and the suggestion that those files contained evidence of perjury by Mr. Gilbert Singer and subornation of perjury by Mr. Meshbesher. It is contended that the intent of the government was to drive a wedge between Mark Singer and his attorney, Mr. Meshbesher, and that the effect has been to deny Mr. Singer

effective representation by the counsel of his choice and to deny him and the other defendants of the possibility of a fair retrial.

From the evidence the Court finds that no one in the United States Attorney's office and, indeed no federal law enforcement employee, leaked the story to the press or was responsible in any way for the unfortunate publicity.

When Mr. Meshbesher received copies of his confidential files from the United States Attorney's office he was naturally outraged, complained bitterly, and suspicioned the worst. He immediately filed the motions to dismiss that we are presently dealing with,and his public reaction became the object of certain news reports in the media. It is essentially the response to such news reports that Mr. Meshbesher is complaining of.

The evidence clearly indicates that Sergeant Johnson, a Minneapolis police

officer working with the DEA, was not only convinced of the merits of this drug case but also firmly believed that Mr. Gilbert Singer had lied when he testified during the first trial. As indicated above, he was convinced of this long before he ever met Mr. Stoll or saw the Meshbesher files. Mr. Schermer was likewise so convinced.

It is also obvious from the evidence that Sergeant Johnson is not fan of Mr. Meshbesher's. In fact, he bears a strong animosity toward Mr. Meshbesher which probably does not arise solely out of the circumstances of this particular case.

After Stoll surfaced and agreed to cooperate and testify and after he provided the Meshbesher files, Sergeant Johnson pushed for the prosecution of Mr. Gilbert Singer for perjury and of Mr. Meshbesher for subornation. When it appears to Sergeant Johnson that the United States Attorney's office did not necessarily agree with him that such

charges should be prosecuted, Sergeant Johnson became indignant. He apparently complained to Judge Lord that the perjury committed in the latter's court was going unprosecuted. When Mr. Meshbesher's motion to dismiss and his complaints of prosecutorial abuse were aired to the media, the Court infers that the prosecutive agencies involved felt a need to defend themselves against such public charges. The Court also infers that someone in the Minneapolis Police Department leaked certain information to the reporter, Mr. McEnroe, which in turn became the basis of the stories presently complained of by the defendants.

It appears to the Court that the motives of Mr. McEnroe source were two-fold: to put pressure on the United States Attorney's office to prosecute the perjury and the subornation of perjury charges and to defend the law enforcement agencies involved against the suggestion

that they were improperly or unlawfully using the Meshbesher files. The Court can find no intent to prejudice the retrial of the defendants in this case or to interfere with the attorney-client relationship between Mr. Meshbesher and Mr. Singer, although there are obvious possible adverse effects in both such areas.

The Court, while recognizing the natural inclination of law enforcement officers to defend themselves against what they believed to be irresponsible charges, nevertheless does not hesitate to condemn the leaking of information not truly based upon fact which of necessity would be harmful to Mr. Meshbesher and to his relationship with his client, Mr. Singer all on the eve of the scheduled trial of this case.

The government, while denying any prosecutorial abuse, argues further that if there was such abuse it had nothing to

do with this case. Such an argument simply will not hold water. It is true that the controversy appeared to revolve around possible collateral criminal charges against Mr. Gilbert Singer and Mr. Meshbesher rather than the issues in this case. However, the perjury alluded to was supposed to have occurred in the first trial of this case, and the suggestion that such in fact occurred and that Mr. Meshbesher had a part in bringing it about can only be regarded as extremely prejudicial to the defendants in this case.

To summarize, the Court finds that the federal prosecutive officials did not directly or indirectly have anything to do with the unfortunate and unfair media publicity arising out of the leak to Mr. McEnroe. In fact, it appears that that leak was partially motivated by a desire to put pressure on such prosecuting

officials to make them pursue the perjury and subornation allegations.

Nevertheless the prosecution of this case appears to have been a joint venture between the Minneapolis Police officials and the Federal Drug Enforcement officials. From the viewpoint of the defendants it matters not that the source of the leak to the media may have been a non-federal police official involved in the prosecution of this case rather than a federal official.

The Court accepts, albeit hesitantly, that law enforcement officials charged with prosecution of this case have improperly leaked information to the press which has had the effect of interfering with the attorney-client relationship between Mr. Singer and Mr. Meshbesher and has also had the effect of creating prejudicial pretrial publicity. Therefore, what is the remedy?

As indicated, the Court accepts that the leak causing the pretrial publicity about the alleged perjury and subornation charges has potentially prejudiced the attorney-client relationship between Mr. Singer and Mr. Meshbesher. Additionally, the Court acknowledges that it may create the possibility of prejudice against all of the defendants at their retrial. Can relief less drastic than dismissal of the indictment adequately solve the problem? The cases clearly indicate that the trial court should make every effort to salvage the prosecution if it can do so by less drastic means that will protect the affected defendants' interests. See the Morrison case I referred to above and also United States versus Abbott Laboratories, 505 F.2d 565, 571, Fourth Circuit 1975, where the Court reversed the District Court which had dismissed the indictment against the defendant for prosecutorial

misconduct in leaking information to the press concerning the case stating:

"Irrespective of the outcome of this case, we join in the district court's condemnation of his conduct and express our strongest disapproval that highly placed legal officers would make a statement of this import with regard to a pending criminal prosecution, and even more so that FDA, which had referred the matter to the Department of Justice, would issue a press release containing such prejudicial material. We are presented, however, with the question of whether this misconduct on the part of the government was so prejudicial to the defendants' right to a fair trial that it should be redressed by dismissal of the indictment with the consequent effect that the interests of society in enforcement of the law should be terminated before the guilt or innocence of the defendants has been determined. What disciplinary action

should be taken in this or any future case against responsible government employees or officials for the patent threat to defendants' right to a fair trial is not a question before us, although it may subsequently become the subject of separate proceedings."

I am still quoting from the Abbott Laboratories case:

"No case of which we are aware, nor any to which we have been referred, holds that, without resort to the traditional means of effective protection of a defendant's right to a fair trial, i.le., voir dire, change of venue, continuance, pretrial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded, and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned, to see if an impartial jury can be impanelled."

The Court then goes on to say: "Of course in the instant case, the factor of governmental misconduct in initiating prejudicial pretrial publicity is greater than it was in Wansley; but this is a distinction, for present purposes, largely without a difference, since the outcome of the case, as we see it, depends upon whether fairness to defendants may still be accomplished and not whether misconduct of the government warrants punishment which also forfeits the rights of society."

"Although Abbot Labs was a due process case rather than a Sixth Amendment case, the analysis for either is the same. The focus is on whether the wedge driven between defendant's and their counsel can be satisfactorily withdrawn and a fair trial had."

Mr. Meshbesher and Mr. Singer have both advised the Court that Mr. Singer has, because of the events here in issue,

decided to drop Mr. Meshbesher and obtain substitute counsel for the retrial of this case. That, of course, is Mr. Singer's right and perogative. But can it truly be argued that the adverse publicity has rendered Mr. Meshbesher's participation at the retrial untenable? Either a continuance or a transfer to another district for trial could, the Court suggests, solve the problem. But it is the defendant who would have to request either of these alternative forms of relief. Who knows? The defendant might come to the conclusion that he could turn recent events to his own advantage by an immediate trial in Minnesota.

The court will retain jurisdiction of this motion until December 28, 1983. If the defendants request for a change of venue to another district under Rule 21 of the Federal Rules of Criminal Procedure by that date, that request will be granted. Of course, even if defendants do not so

move by December 28, 1983, they will be free to attempt to convince the trial judge to grant such a motion later on. And, of course, consistent with speedy trial requirements they may always apply to the trial court for a continuance so that the effect of pretrial publicity may be dissipated by the date of retrial.

Now I mention the possibility of a transfer to another district for trial. I have used that process myself, transferring cases here to be tried in Tennessee. Judge Nangle in Missouri has brought a St. Louis case here to Little Rock for trial under the same rule.

Very well. The Court will return this case to Judge Murphy for further processing or reassignment not later than December 31, 1983 in conformity with the orders of Judge Lay.

Gentlemen, that's it.

Is there anything else?

I can't hear you. Speak up.

MR. LEE: John Lee. I don't have anything to add at this point. Mr. Meshbesher is here.

THE COURT: Mr. Meshbesher?

MR. MESHBESHER: I assume that that's in writing, Your Honor. How soon will we get it?

THE COURT: It's partially typed, handwritten notes, partially cases from which I have read. So what you have is the court reporter has taken it all down, and I think the only feasible way is to ask her to prepare a copy of it for your benefit. I can ask her now if you wish how soon you might get that, but I know there are going to be a lot of problmes here in the holiday period and also we are in the middle of a big ice and snow storm down here.

Let me go off the record.

(Discussion off the record.)

THE COURT: All right, gentlemen, I am told that she will make an effort to get

it to you the first part of next week. That's the best we can do.

MR. MESHBESHER: I understand all proceedings will be stayed at least until the 28th or the 31st?

THE COURT: I'm giving you to the 28th to file any such motion to another district. In any event, this case will return to Minnesota by the 31st in accordance with Judge Lay's commission.

MR. MESHBESHER: The reason I asked is that is there a formal stay to be granted because I am contemplating taking the matter to the Eighth Circuit.

THE COURT: That will be a problem that a judge there in Minnesota can handle. When the case comes back, if you take it to the Eighth Circuit they can handle the problems at the trial level.

MR. MESHBESHER: Thank you, Your Honor.

MR. LEE: Thank you, Your Honor.

THE COURT: Nice to have met you both.

(Whereupon, at 5:45 p.m. the telephone conference was concluded.)